IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
March 21, 2016 Session

VICKI RUSSELL v. DANA CORPORATION

Appeal from the Chancery Court for Smith County
No. 5352 Charles K. Smith, Chancellor

No. M2015-00800-SC-R3-WC – Mailed June 30, 2016
Filed August 1, 2016

In 1994, the employee received workers' compensation benefits and future medical benefits for a work-related cervical spine injury and left carpal tunnel syndrome she sustained in 1991. The year after the employee received workers' compensation benefits, the physician treating her work-related injury referred the employee to her primary care physician for continued treatment of her work injury. From 1995 to the present, the employee's primary care physician has treated her work-related injury and other medical problems unrelated to her work. In 2010, the employee underwent two surgeries on her left shoulder and left knee unrelated to her work injuries. In June 2013, the employer filed a motion seeking an independent medical evaluation, which the trial court granted. After receiving the report from the evaluation, the employer filed motions seeking to "de-authorize," or remove the employee's treating physician and permission to provide a panel of three pain management physicians for the employee's future medical treatment. The trial court denied the motions. The employer has appealed from that order. Pursuant to Tennessee Supreme Court Rule 51, the appeal has been referred to the Special Workers' Compensation Appeals Panel for a hearing and a report of findings of fact and conclusions of law. We reverse the judgment of the trial court and remand for proceedings consistent with this decision.

Tenn. Code Ann. § 50-6-225(a)(2) (2014) Appeal as of Right; Judgment of the Chancery Court Reversed; Case Remanded

BEN H. CANTRELL, SP.J., delivered the opinion of the Court, in which CORNELIA A. CLARK, J., and PATRICIA J. COTTRELL, SP.J., joined.

William F. Kendall, III, Jackson, Tennessee, for the appellant, Dana Corporation.

Jacky O. Bellar and Jamie D. Winkler, Carthage, Tennessee, for the appellee, Vicki Russell.

OPINION

Factual and Procedural History

In 1991, Vicki Russell ("Employee") sustained a compensable cervical spine injury and left carpal tunnel syndrome in the course of her employment for Dana Corporation ("Employer"). Employee was initially treated by Dr. Gregory Lanford for the work-related injury, and he opined that Employee reached maximum medical improvement (MMI) on or about March 19, 1992. Employee returned to work for Employer on March 2, 1992, but was laid off on July 19, 1993, and has never returned to work for Employer or worked for any other employer. After a trial in 1994, at which the only issue in dispute was the extent of Employee's disability, the trial court awarded Employee 80% permanent partial disability benefits to the body as a whole and future medical benefits. After the trial, Employee returned to Dr. Lanford for treatment on one occasion, on August 11, 1994, at which time Dr. Lanford referred Employee to Dr. Richard Rutherford, a family practice physician, for her future medical care.

Employee first saw Dr. Rutherford in November 1995, and Dr. Rutherford has treated Employee "off and on" since, both for her work-related injury and for multiple other medical conditions unrelated to her work injuries, including low back pain, panic attacks, and two apparent suicide attempts, once in 2004 and again in 2005, when Employee overdosed on her pain medications. As part of that treatment, between 1995 and 2013, Dr. Rutherford prescribed various combinations of medications for Employee, including Lorcet, Valium, Zoloft, Neurontin, Bextra, Flexeril, Xanax, Dexamethasone, Cymbalta, Effexor, Trilepital, Lortab, Celebrex, Percocet, Mobic, Trazadone, Lyrica, Celexa and Zanaflex. Of these, Employee stated Dr. Rutherford prescribed Oxycodone, Celexa, Mobic, Xanax, and Zanaflex for treatment of her work-related injury. As of February 2010, Employee was taking approximately 510 pills a month. By August 30, 2012, Employee was diagnosed with "chronic pain syndrome." Moreover, in 2010, Dr. Jon Cornelius, an orthopedic surgeon, performed surgery on Employee's left rotator cuff, which was unrelated to Employee's work injuries. Finally, in 2013, Employee was receiving treatment from a psychiatrist for "anxiety/panic attacks diagnosed/post[-]traumatic stress disorder," conditions also unrelated to her work injury.

In February 2010, Employer engaged Dr. Anthony Riso, M.D., board certified in anesthesiology and pain management, to conduct a Comprehensive Medication Therapy

Review of Employee's medication regimen.[1] See Russell v. Genesco, Inc., 651 S.W.2d 206, 211 (Tenn. 1983) (citing Tenn. Code Ann. § 50-6-204(a)(1)) (describing employer's access to medical reports, and hospital records and charges). Dr. Riso recommended gradually reducing and ultimately discontinuing all but one of Employee's six medications. In March 2012, Dr. Rutherford responded to each of Dr. Riso's recommendations by marking the box for "no," indicating he would not accept Dr. Riso's recommendation. Dr. Rutherford also handwrote that the changes were "[n]ot [g]oing to happen." By way of explanation, Dr. Rutherford included a note stating only that "[a]ll medications are indicated and have proven beneficial to this patient. Unless her situation changes, I have no plans to initiate changes."

On June 20, 2013, Employer filed a motion requesting that Employee be ordered to attend an independent medical examination ("IME") pursuant to Tennessee Code Annotated section 50-6-204(d)(1), and Employer specified that the proposed IME would be performed by Dr. Thomas Scott Baker, a board certified pain specialist, whose qualifications are consistent with Tennessee Code Annotated section 50-6-204(j)(2)(B). In the motion, Employer argued that Employee had placed the issue in controversy by previously refusing its request for an IME. The trial court granted Employer's motion, and the IME occurred on September 30, 2013. Dr. Baker completed a C-32 Standard Form Medical Report For Industrial Injuries ("C-32"), which was introduced into evidence without objection from Employee. In that C-32 Report, Dr. Baker stated:

> [I]n my examination [on] 9/30/13, now 22 years past her [date of injury], [Employee] has generalized tenderness everywhere with normal cervical and [left] shoulder ROM. She does not have ANY focal cervical or shoulder findings. I cannot attribute her painful condition [and] widespread complaints [and] findings to the work injury [of] 3/19/91. I would not provide any impairment for 3/19/91 at this time.
>
> . . . .
>
> At this time, I do not find her 3/19/91 work injury to be the cause of her current "pain [and] inabilities." I would not provide any restrictions at this time directly related to the work injury on 3/19/91.

Dr. Baker also reviewed each of the medications Employee was taking at the time of his examination:

> 1. Citalopram[: Employee] does not know what this medication is for, she states it relaxes her. It is an antidepressant and is reasonable for treatment

[1] The documents in the record indicate that Dr. Riso conducted his review in February 2010. However, for reasons not identified in the record, Dr. Riso did not attempt to contact Dr. Rutherford until February 2012, when he attempted at least seven times to contact him. Dr. Rutherford did not respond until March 2012. Although Dr. Riso's report is not in the record on appeal, a document was introduced at trial listing his recommendations and providing spaces for Dr. Rutherford to respond to each of them.

of depression. Her depression has been severe in the [past] with suicide attempt[s;] she feels like her depression is doing well. This medication is not related to the 1991 injury, but is reasonable to continue for depression.

2. Alprazolam (Xanax)[:] 1 mg PO three or four times a day. This is considered fairly high dose benzodiazepine therapy[;] she states it's for her nerves. There is no clear diagnosis for this at this time. It is uncommon to use on a long-term basis[,] especially 3-4 times a day. Perhaps 1-2 a month for a severe panic attac[k]. However with her ongoing alcoholism documented in the chart[,] benzodiazepines are contraindicated and should be weaned and discontinued.

3. Lyrica[:] she said this helps with the numbness and shooting pain but also causes swelling. She has decreased the dose herself from three times a day to twice a day. She states that it makes her feel fuzzy headed and she is not comfortable taking this medication and driving. In my opinion these side effects are significant and causing impairment, therefore the medicine should be discontinued.

4. Zanaflex[:] 4 mg three times a day. Again [Employee] is not sure what this medication is for but states "it relaxes me." In my opinion it is a muscle relaxer[.] [C]ertainly it is reasonable to continue this . . . if it is providing function improvement. She will need liver function evaluations on a regular basis especially with the concern for liver dysfunction in light of her alcoholism and I would recommend[] vigilant monitoring or consider[ing] an alternative muscle relaxer.

5. Meloxicam[:] once a day for arthritis[.] [T]his is a nonsteroidal anti-inflammatory[.] [I]t is . . . reasonable to continue this medicine[.] [S]he reports that she does have an improvement[.] [A]gain this is for arthritis and is not related to her work injury.

6. Opioid therapy[:] she was taking hydrocodone (Lortab) - schedule III; this was recently increased to oxycodone (Percocet) schedule II; she is taking five pills a day . . . as needed for pain. It is not recommended to be on more than 4 doses of short acting pain medication a day. This is contraindicated in a patient with ongoing alcoholism. Again her opioid risk assessment is high. This risk means the providers should use great caution and monitoring if opioid therapy is to be continued. It also means the provider must weigh[] this risk against the potential benefit of the medication being prescribed. Although she states her pain is better controlled there is no clear documentation of any functional improvement. She is disabled and [dependent] on her husband. Opioids are

> contraindicated in the face of ongoing alcoholism. Opioids [should] be discontinued.
>
> None of the medications discussed above are indicated for the treatment of her work injury in 1991. There are numerous conditions which have occurred since that time that clearly play[] the major role in generating her chronic pain syndrome. No further treatment recommended for the work injury in 1991.

In summary, Dr. Baker opined that none of Employee's medications are necessary as treatment for her 1991 work injury, and that, while some are necessary for other conditions, he recommended that she discontinue multiple pain medications. Dr. Baker also highlighted Employee's alcoholism, noting that Employee acknowledged having "two whiskeys" the evening prior to the IME. Relying on Dr. Baker's opinions, Employer filed a motion seeking permission to "de-authorize," or remove Dr. Rutherford as Employee's authorized treating physician and to present Employee with a panel of pain management physicians from which to seek further treatment. In its motion, Employer relied on Tennessee Code Annotated section 50-6-204(j), which applies to pain management treatment for workers' compensation injuries. Employer also submitted Dr. Baker's C-32 Report in support of the motion without objection.

Employee opposed the motion and submitted her own affidavit stating that Dr. Rutherford began prescribing various medications for her 1991 work-related injury prior to her other conditions arising, including her back, shoulder, and knee problems. She also stated the medications had been effective in controlling her "pain, function and overall quality of life." In opposition to the motion, Employee relied upon the document containing Dr. Riso's recommendations and Dr. Rutherford's March 2012 responses to them.

The trial court took Employer's motion under advisement and issued an order on March 30, 2015. The court found that Dr. Rutherford had not made a determination that Employee's pain was persisting beyond the expected period of healing, and therefore, Tennessee Code Annotated section 50-6-204(j) was not applicable to the case. The trial court observed that, pursuant to long-standing precedents, treatment by an authorized physician is presumed to be necessary. Citing Bazner v. American States Insurance Company, 820 S.W.2d 742 (Tenn. 1991) and Goodman v. Oliver Springs Mining Company, Inc., 595 S.W.2d 805 (Tenn. 1980), the trial court concluded that an employer may not force an employee to change physicians after treatment has commenced. Therefore, the trial court denied Employer's motion and awarded Employee costs and attorney's fees.

In this appeal, Employer contends that section 50-6-204 requires it to provide Employee a panel of pain management physicians for future medical care; that section

50-6-204(j) governs Employee's pain management care; and that section 50-6-204(b) does not authorize an award of attorney's fees in these circumstances.

Analysis

Appellate review of decisions in workers' compensation cases is governed by Tennessee Code Annotated section 50-6-225(a)(2) (2014), which provides that appellate courts must "[r]eview . . . the [trial] court's findings of fact . . . de novo upon the record of the [trial] court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise." As the Supreme Court has observed many times, reviewing courts must conduct an in-depth examination of the trial court's factual findings and conclusions. Wilhelm v. Krogers, 235 S.W.3d 122, 126 (Tenn. 2007). When the trial court has seen and heard the witnesses, considerable deference must be afforded the trial court's factual findings. Tryon v. Saturn Corp., 254 S.W.3d 321, 327 (Tenn. 2008). No similar deference need be afforded the trial court's findings based upon documentary evidence such as depositions. Glisson v. Mohon Int'l, Inc./Campbell Ray, 185 S.W.3d 348, 353 (Tenn. 2006). Similarly, reviewing courts afford no presumption of correctness to a trial court's conclusions of law. Seiber v. Reeves Logging, 284 S.W.3d 294, 298 (Tenn. 2009).

The Independent Medical Examination

We will first determine whether the trial court erred by granting Employer's motion to require Employee to submit to the IME. Tennessee Code Annotated section 50-6-204(d)(1) provides:

> The injured employee must submit to examination by the employer's physician *at all reasonable times if requested to do so by the employer*, but the employee shall have the right to have the employee's own physician present at the examination, in which case the employee shall be liable to the employee's physician for that physician's services.

Id. § 50-6-204(d)(1) (emphasis added). The Tennessee Supreme Court has observed that the foregoing statute is intended to permit an employer to "[ascertain] whether the ailments from which the employee suffers at some period subsequent to the injury is due to that injury or to some other cause not connected with his or her employment." Trent v. Am. Serv. Co., 206 S.W.2d 301, 303 (Tenn. 1947); see also Overstreet v. TRW Commercial Steering Div., 256 S.W.3d 626, 637 (Tenn. 2008) (affirming the principle established in Trent), abrogation on other grounds recognized by Hayes v. Am. Zurich Ins. Co., No. E2010-00099-WC-R3-WC, 2011 WL 2039402 (Tenn. Workers' Comp. Panel May 25, 2011). The only limitations placed on the employer's right to require the employee to submit to an IME is that the employer's request be made at a "reasonable time[]," see Tenn. Code Ann. § 50-6-204(d)(1), and "be reasonable, *as a whole*, in light

of the surrounding circumstances," Overstreet, 256 S.W.3d at 637 n.4 (emphasis added) (citing Tenn. Code Ann. §§ 50-6-204(d)(1), (d)(8)). Subject to these limitations, "if an employer's request for such an examination is reasonable, . . . the trial court is obligated to grant it." Irons v. K & K Trucking, Inc., No. M2010-01280-WC-R3-WC, 2011 WL 2732475, at *4 (Tenn. Workers' Comp. Panel July 14, 2011); see also Overstreet, 256 S.W.3d at 636 (holding that "a plain reading of . . . section 50-6-204 gives the employer a right to compel the employee to undergo an [IME], so long as the request is 'reasonable'").

Tennessee's "trial courts have been afforded the discretionary authority to determine whether the employer's request for examination is reasonable" and, accordingly, appellate courts review these decisions using the "abuse of discretion" standard. Overstreet, 256 S.W.3d at 637, 639. "[R]eviewing courts will set aside a discretionary decision only when the court that made the decision applied incorrect legal standards, reached an illogical conclusion, based its decision on a clearly erroneous assessment of the evidence, or employ[ed] reasoning that cause[d] an injustice to the complaining party." Myers v. Vanderbilt Univ., No. M2008-02009-WC-R3-WC, 2010 WL 1854141, at *5 (Tenn. Workers' Comp. Panel May 11, 2010) (quoting Konvalinka v. Chattanooga-Hamilton Cnty. Hosp. Auth., 249 S.W.3d 346, 358 (Tenn. 2008)).

In Irons, the trial court denied three motions the employer filed seeking to compel the employee to undergo an IME. Irons, 2011 WL 2732475, at *1-3. The final motion was filed in 2010, six years after the work-related injury, and the trial court denied it, despite evidence raising questions about whether the employee's ongoing symptoms were related to his initial work injury. Id. at *5. Prior to filing the 2010 motion, and roughly five years after the work injury, the employer had a doctor conduct a "Utilization Review Determination." The physician opined that the additional treatment proposed by the employee's doctor was "not medically necessary to treat the [e]mployee's condition." Id. The Irons Panel found that, "[b]ased upon these medical opinions, the [e]mployer had a good faith reasonable basis for questioning both the causation and the necessity of the proposed treatment and for filing a motion for a physical examination of the employee," and held that the trial court had abused its discretion in dismissing the motions. Id.

Similarly, here Employer filed a motion to compel Employee to undergo an IME in June 2013, more than twenty years after her 1991 work-related injury. Between the 1994 final judgment and 2013, Employee's medication regime had expanded to include an assortment of pain medications that were prescribed to treat various issues unrelated to her work injury, including two suicide attempts in 2004 and 2005, and at least one surgery in 2010. Documentary proof from Dr. Riso's medication review establishes that he had recommended reducing then eliminating all but one of the medications Dr. Rutherford had prescribed for Employee, concluding that Employee's medication regime was excessive. Yet, in his response to Dr. Riso's recommendations, Dr. Rutherford flatly refused to alter any of Employee's medications, and he failed to supply an adequate

explanation as to either the condition each medication was prescribed to treat or which of the many medications were prescribed to treat the work-related injury.

The proof in this record, as in Irons, establishes that Employer had a good faith reasonable basis for questioning both the causation and the necessity of the medication regime Dr. Rutherford had prescribed, and for filing its motion for an IME of Employee. Dr. Rutherford's long term physician-patient relationship with Employee does not exempt Employee from Tennessee Code Annotated section 50-6-204(d)(1), which required her to undergo an IME so long as Employer's request was reasonable. Nothing in this record undercuts the trial court's conclusion that Employer's motion was reasonable. To the contrary, Dr. Rutherford's prescription of various types and high dosages of medications for more than twenty years after the Employee's work-related injury supports Employer's argument that asking Employee to undergo an IME was reasonable. In light of the surrounding circumstances, and applying the standards set out in Overstreet, Trent, and Irons, we find that the trial court did not abuse its discretion by granting Employer's motion to compel Employee to undergo an IME.

Motion to Remove Employee's Treating Physician

After conducting the IME on September 30, 2013, Dr. Baker prepared a C-32 Report in which he opined that many of Employee's pain medications should be discontinued and that none were needed to treat Employee's 1991 work injury. Based upon Dr. Baker's findings, Employer filed a motion to remove Dr. Rutherford as Employee's authorized treating physician and present a new panel of pain management physicians to Employee. Both Employer and Employee submitted affidavits and documentary evidence; neither presented witnesses or testimony in the trial court. The trial court denied Employer's motion, holding that "[o]nce it has been determined that employee is entitled to medical benefits, employer should not be allowed to force the employee to change physicians once treatment has begun in a progress occupational disease." Whether an employer has the legal ability to present evidence in an effort to require an employee to change physicians once treatment has begun is a question of law, which we review de novo. See Seiber, 284 S.W.3d at 298. We conclude that the trial court erred by denying Employer's motion to remove Dr. Rutherford as Employee's authorized treating physician.

The Supreme Court has previously addressed the removal of a treating physician after treatment of a progressive occupational disease began. See Goodman, 595 S.W.2d at 807-08. In Goodman, an employer attempted to force the injured employee to change physicians after the employee justifiably engaged his own physician, supporting the attempt by relying solely on its statutory privilege to provide a panel of physicians in the first instance. See id. at 808. The Supreme Court held that "in the absence of a change in condition or evidence that the treatment [is] defective or additional treatment is needed the claimant [is] entitled to continue the use of his own doctor." Id. (quoting Arthur

Larson, Law of Workmen's Compensation § 61.12, 10-454-455). An employer cannot satisfy this standard except by offering proof to show a change in condition, defective treatment, or a need for additional treatment.

Here, Employer moved to replace Dr. Rutherford, and attempted to establish both a change in Employee's condition and evidence that Dr. Rutherford's treatment is defective and unnecessary to treat her work-related injury. Id. "[A]n employer is not liable for post-judgment medical treatment made necessary by an intervening cause." Cruse v. Rollins Truck Leasing, No. W2008-02027-WC-R3-WC, 2009 WL 2231205, at *2 (Tenn. Workers' Comp. Panel July 27, 2009) (citing Anderson v. Westfield Grp., 259 S.W.3d 690, 698-99 (Tenn. 2008)). "Whether or not a particular medical treatment is 'made reasonably necessary' by [an] [e]mployee's work for [the] [e]mployer . . . is a question which must be answered based upon the proof presented at the time the treatment is proposed." Hegger v. Ford Motor Co., No. M2007-00759-WC-R3-WC, 2008 WL 4072047, at *4 (Tenn. Workers' Comp. Panel Sept. 2, 2008) (quoting Underwood v. Liberty Mut. Ins. Co., 782 S.W.2d 175, 176 (Tenn. 1989), abrogated on other grounds by Bazner, 820 S.W.2d at 745).

It is true that, as Employee's treating physician, Dr. Rutherford is entitled to a rebuttable presumption that his treatment of her work-related injuries is reasonable and necessary and that "[t]he employer has the burden of persuading the court to the contrary." Russell, 651 S.W.2d at 211; see also Grier v. Alstom Power, Inc., No. E2012-01394-WC-R3-WC, 2013 WL 1460520, at *4 (Tenn. Workers' Comp. Panel Apr. 10, 2013). We recognize that our Supreme Court has not articulated the standard of proof an employer must meet to persuade the court that the presumption of necessity and reasonableness has been overcome. See, e.g., Russell, 651 S.W.2d at 211 (holding that the "employer has the burden of persuading the court to the contrary"); Grier, 2013 WL 1460520, at *4 (finding that the treating physician's "treatment is presumed to be reasonable and necessary and the burden of proof is on the employer to show otherwise"). As in other civil actions, the standard of proof in workers' compensation cases is preponderance of the evidence. Parker v. Ryder Truck Lines, Inc., 591 S.W.2d 755, 759 (Tenn. 1979) ("The function of a trial judge in deciding workmen's compensation cases is no different from that in any other civil action. The burden of proof rests upon the party claiming the benefits of the Workmen's Compensation Act to establish the claim by a preponderance of all the evidence."). Accordingly, in the absence of a statute prescribing a different standard, we conclude that this same standard applies when an employer seeks to rebut the presumption of reasonableness and necessity.[2] Evaluating the record on appeal in light of this standard, we conclude that

[2] See Tenn. Code Ann. § 50-6-204(d)(5) (stating that clear and convincing evidence is necessary to rebut the presumption of accuracy statutorily afforded the independent medical examiner's impairment rating).

Employer has rebutted the presumption that Dr. Rutherford's treatment is reasonable and necessary.

Employer and Employee presented evidence in the form of an affidavit and documentary evidence; thus, we are able to reach our own conclusions about the weight of this documentary evidence. See Glisson, 185 S.W.3d at 353. Dr. Baker is a board-certified pain management specialist and qualified under Tennessee Code Annotated section 50-6-204(j)(2)(B). Dr. Baker's C-32 Report included not only a full history of Employee's initial injury and subsequent medical treatment but also an assessment and analysis of the risks and benefits of each medication Dr. Rutherford has prescribed Employee, along with an explanation for each of his recommendations concerning Employee's medication. For almost twenty years, Dr. Rutherford prescribed Employee various combinations of Lortab, Lorcet, and Percocet, all of which are Schedule II controlled substances. See Tenn. Code Ann. § 39-17-408(b)(1)(F). Dr. Baker opined in his C-32 Report that none of the medications prescribed by Dr. Rutherford are necessary as treatment for Employee's 1991 work injuries. While he concluded that some are necessary for other conditions, he recommended discontinuing many of the pain medications and stated that many of the medications Dr. Rutherford has prescribed to Employee are providing little or no benefit and are creating a substantial risk to her health. Dr. Baker's C-32 Report also stated that Employee has twice overdosed on her pain medications, often takes Percocet in amounts exceeding the prescribed dosage, and regularly consumes alcohol while taking various mixtures of opioids, muscle relaxers, anxiety medication, anti-inflammatory medication, and anti-depressants. The C-32 Report establishes that Employee has misused, and continues to misuse, her medications.

In response to Dr. Baker's C-32 Report, Employee submitted her own affidavit, in which she states that her medications are beneficial to her and that some of them were prescribed to her before any of her later, non-work injuries. While lay testimony may be introduced to determine the "extent of an injury," expert medical testimony is generally required to prove causation and permanence. See McClendon v. Food Lion, LLC, No. E2013-00380-WC-R3-WC, 2014 WL 3407430, at *4 (Tenn. Workers' Comp. Panel July 11, 2014). Employee is not a physician and, therefore, lacks the education and training necessary to determine whether pain medications are necessary and reasonable treatment for, or causally-related to, her 1991 work injuries or to assess the risks and benefits of her medications.

Employee also submitted Dr. Rutherford's handwritten response to Dr. Riso's recommendation. However, Employee has failed to establish that Dr. Rutherford is a qualified pain management specialist,[3] whereas both Drs. Riso and Baker are qualified

[3] While neither Employee nor Employer provide Dr. Rutherford's curriculum vitae, he has been described as a family practice doctor, and Employer has asserted several times that Dr. Rutherford is not a qualified physician under section 50-6-204(j)(2)(B). Employee has not refuted Employer's assertion.

physicians under the statute, lending weight to their opinions regarding the prescription of Schedule II, III, and IV controlled substances. See Tenn. Code Ann. § 50-6-204(j)(2)(B). Additionally, Dr. Rutherford's handwritten response lacks any analysis or explanation of his own opinions as to why Employee's pain medications are needed to treat her initial work injuries, and it is not responsive to Dr. Baker's C-32 Report and recommendations. In his response to Dr. Riso, Dr. Rutherford has checked "No" next to several inquiries about the changes Dr. Riso proposed to Employee's medication regimen and has handwritten a few sentences and fragments of sentences, stating that the medications are beneficial to Employee and emphasizing Dr. Rutherford's unwillingness to modify his course of treatment in any way. In response to the various instances of misuse, Dr. Rutherford has neither attempted to reduce the dosages prescribed nor referred Employee for treatment for her addiction. Indeed, he replaced her hydrocodone prescription with the more powerful opioid, oxycodone.

Accordingly, Dr. Baker's C-32 Report and recommendations stand in the record as virtually undisputed. We conclude that Employer has rebutted by a preponderance of the evidence the presumption that Dr. Rutherford's treatment of Employee's work-related injuries is reasonable and necessary, and has established that the treatment is defective and additional treatment is needed. See Goodman, 595 S.W.2d at 808. We reverse the trial court's denial of Employer's motion to remove Dr. Rutherford. We conclude that the proper resolution of this appeal is to direct Employer to provide Employee with a panel of physicians, from which Employee must choose a new treating physician to replace Dr. Rutherford. Our decision in this appeal in no way precludes Employee from continuing to obtain medical treatment from Dr. Rutherford for other non-work-related ailments and injuries.

Applicability of Tennessee Code Annotated section 50-6-204(j)(1)

Having concluded that the trial court erred by denying Employer's motion to remove Dr. Rutherford, we must next determine whether Tennessee Code Annotated section 50-6-204(j) controls her future pain management. The subsection was originally enacted in 2012 to govern the prescription of pain management medications, and states that:

> If a treating physician determines that the pain is persisting for an injured or disabled employee beyond an expected period for healing, the treating physician may either prescribe, if the physician is a qualified physician as described in subdivision (j)(2)(B), or refer, such injured or disabled employee for pain management encompassing pharmacological, nonpharmacological or other approaches to manage chronic pain.

Tenn. Code Ann. § 50-6-204(j)(1).

This Panel previously considered the purpose and scope of section 50-6-204(j) and, after reviewing the legislative history, held that "[t]he purpose of [Tennessee Code Annotated section 50-6-204(j)], reflected in its plain language, is to apply the new restrictions . . . to referrals for pain management and to prescriptions for Schedule II, III, and IV controlled substances that occur after July 1, 2012." Patterson v. Prime Package & Label Co., LLC, No. M2013-01527-WC-R3-WC, 2014 WL 7263811, at *5 (Tenn. Workers' Comp. Panel Dec. 22, 2014). As Employee received prescriptions for Schedule II controlled substances after the July 1, 2012 effective date, any future pain management treatment she may receive is governed by Tennessee Code Annotated section 50-6-204(j).

Proof in the record on appeal demonstrates that Employee reached MMI in March 1992, has received Schedule II controlled substances to manage her pain for over twenty years, and was diagnosed with chronic pain syndrome in 2012. This proof establishes that Employee's pain has "persist[ed] . . . beyond an expected period for healing" and, pursuant to the statute, must be managed by a qualified physician under Tennessee Code Annotated section 50-6-204(j). To ensure that her new treating physician is statutorily able to prescribe her any Schedule II, III, or IV controlled substances if he or she determines it necessary for her 1991 work-related injury, the panel of physicians provided by Employer shall be comprised of qualified physicians under subdivision (j)(2)(B). Employer shall exclude Drs. Baker and Riso from the panel, because each of them has already formed a medical opinion concerning Employee. Cf. Tenn. Code Ann. § 50-6-204(d)(5) (excluding the physician who performed the IME from the panel). Any new physician Employee chooses must first determine whether any of Employee's pain arises from her 1991 work-related injuries, and if so, the new physician must provide Employee with appropriate treatment of that pain. See id. § 50-6-204(j)(2)(A).

Attorney's Fees

The trial court awarded attorney's fees to Employee. Although the court's order did not refer to any specific authority for this award, both parties cite Tennessee Code Annotated section 50-6-204(b)(2) as the basis of the award of fees. Employer contends this statute does not apply to a motion brought pursuant to Tennessee Code Annotated section 50-6-204(j). Employer also argues that no evidence was presented that Employee had been denied medical care, as required by Tennessee Code Annotated section 50-6-204(b)(2). As a result of our reversal of the trial court's order, Employee is no longer the prevailing party in this matter. Therefore, we vacate the trial court's award of attorney's fees, and decline to address whether attorney's fees may ever be awarded under section 50-6-204(j).[4]

[4] We note another Panel has held that Tennessee Code Annotated section 50-6-204(b)(2) does not authorize an award of attorney fees incurred in these circumstances. See Kephart v. Hughes Hardwood Int'l, Inc., No. 2011-01568-WC-R3-WC, 2012 WL 3329705, at *5-6 (Tenn. Workers' Comp. Panel Aug. 15, 2012).

Conclusion

The trial court's denial of Employer's motions is reversed. The award of attorney's fees is vacated. The case is remanded to the trial court for further proceedings consistent with this opinion. Costs are taxed to Vicki Russell, for which execution may issue, if necessary.

BEN H. CANTRELL, SPECIAL JUDGE

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE

VICKI RUSSELL v. DANA CORPORATION

Chancery Court for Smith County
No. 5352

No. M2015-00800-SC-R3-WC – Filed August 1, 2016

JUDGMENT

This case is before the Court upon the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's Memorandum Opinion setting forth its findings of fact and conclusions of law, which are incorporated herein by reference.

Whereupon, it appears to the Court that the Memorandum Opinion of the Panel should be accepted and approved; and

It is, therefore, ordered that the Panel's findings of fact and conclusions of law are adopted and affirmed, and the decision of the Panel is made the judgment of the Court.

Costs will be paid by Vicki Russell, for which execution may issue if necessary.

PER CURIAM